

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GUNDERSON, INC.,
an Oregon corporation,

Plaintiff,

No. CV 05-699-MO

OPINION & ORDER

v.

DAVIS-FROST, INC.,
a Minnesota corporation,

Defendant.

Mosman, J.,

On September 17, 2007, I held oral argument on defendant's Motion for Summary Judgment (#49). Following my decision at oral argument, the only remaining issue is plaintiff's indemnity claim. Because plaintiff fails to present sufficient evidence on this claim, I GRANT summary judgment.

DISCUSSION

Plaintiff argues that the applicable standard for an indemnity claim is "implied warranty indemnity" as outlined by *Bellevue South Associates v. HRH Construction*, 579 N.E.2d 195 (N.Y. 1991). Pl.'s Mem. in Opp. to Def.'s M. for Summ. J. at 29-30. Defendant argues that Oregon has not adopted "implied warranty indemnity." Def.'s Reply Mem. in Supp. of Def.'s M. for Summ. J. at 19-20. Defendant is correct.

The applicable standard for indemnity under Oregon law is outlined in *Fulton Ins. v.*

White Motor Corp., 493 P.2d 138 (Or. 1972), superseded by rule in part on other grounds as recognized in *Waddill v. Anchor Hocking, Inc.*, 8 P.3d 200 (Or. 2000). In a claim for indemnity, "the claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter." *Id.* at 140-41 (citations omitted).

A recent Oregon Court of Appeals case, *Moore Excavating, Inc. v. Consol. Supply Co.*, 63 P.3d 592 (Or. Ct. App. 2003), applied these requirements to facts very similar to this case. In *Moore Excavating*, Moore installed a water system for Aspen Meadows, LLC, using pipes and glue it purchased from Consolidated Supply Co. *Id.* at 594. After installation, the system began to leak, and Moore and Aspen entered into a settlement agreement in which Moore paid Aspen a sum of money. *Id.* Moore subsequently sued Consolidated for indemnity, arguing that the pipes and glue were faulty or defective. *Id.* Although the analysis in *Moore Excavating* focused on the first of the three requirements, the court stated that a claim for indemnity must satisfy each requirement and concluded that Moore had not met this burden. *Id.* at 595-96.

The relevant facts of the dispute between plaintiff and defendant are almost identical to the facts of *Moore Excavating*; thus, the three requirements outlined in *Fulton* apply. In the current dispute, plaintiff admits that TTX and Pacer are not in privity with Davis-Frost.¹ Rough Transcript of Oral Argument at 17, *Gunderson, Inc. v. Davis-Frost, Inc.*, CV 05-699-MO (Dist.

¹ Privity is necessary to support an action where only economic injury is alleged. *Colvin v. FMC Corp.*, 604 P.2d 157, 160 (Or. Ct. App. 1979) (citing *State ex rel. W. Seed v. Campbell*, 442 P.2d 215 (Or. 1968); *Hupp v. Metered Washer Service*, 472 P.2d 816 (Or. 1970); *Davis v. Homasote Co.*, 574 P.2d 1116 (Or. 1978)). "[T]o allow a nonprivity warranty action to vindicate every disappointed consumer would unduly complicate the code's scheme, which recognizes the consensual elements of commerce." *W. Seed*, 442 P.2d at 217.

Or. Sept. 17, 2007). Consequently, the second requirement is not met—*i.e.*, Davis-Frost is not "also liable to the third party"—and Gunderson does not have a claim for indemnity under Oregon law.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment on plaintiff's indemnity claim is GRANTED.

IT IS SO ORDERED

DATED this 24th day of October, 2007.

/s/ Michael W. Mosman

MICHAEL W. MOSMAN
United States District Judge